

EXHIBIT A

12:14:46

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

****CORRECTED TITLE PAGE****

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UNITED STATES OF AMERICA) 23CR99
)

vs.

Buffalo, New York

SIMON GOGOLACK, PETER
GERACE, JR., JOHN THOMAS ERMIN,
MICHAEL RONCONE, FRANK KNIGHT,
HOWARD HINKLE, JR., CORTNIE
BARBER, BERNARD BYRD, III,
SCOTT BARNES,) July 22, 2024
Defendant. 2:00 p.m.

- - - - - X

MOTION ARGUMENT

Transcribed from an Electronic Recording Device

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMIAH J. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

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24
25

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2 P R O C E E D I N G
3 * * *

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5 THE CLERK: On the record in criminal
6 proceeding 23CR99, United States of America versus
7 Gogolack, et al for oral argument. Present in the
8 courtroom are Assistant United States Attorneys Nicholas
9 Cooper, Casey Chalbeck and Joseph Tripi.

10 Defendant Simon Gogolack with Assistant Federal
11 Public Defenders Jeffrey Bagley and John Morrisey;
12 attorney Mark Foti for defendant Peter Gerace; defendant
13 John Ermin with attorney George Muscato; defendant
14 Michael Roncone with attorney Paul Dell; attorney Clair
15 Montroy for Frank Knight; defendant Howard Hinkle, Jr.,
16 with attorney Frank Bogulski and Daniel Henry; attorney
17 Brian Hutchinson for defendant Cortnie Barber; defendant
18 Bernard Byrd with attorney Michael Stachowski; and
19 defendant Scott Barnes with attorney David Cotter.

20 The Honorable Jeremiah J. McCarthy presiding.

21 MAGISTRATE JUDGE MCCARTHY: Good afternoon,
22 everyone.

23 MR. COOPER: Good afternoon, Judge.

24 THE COURT: We have a number of motions
25 before me. I'll list them in chronological order.

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2 First, 123 is the government's motion to exclude Speedy
3 Trial Act time; 129 is the government's motion for
4 protective order; 131 is Defendant Gogolack's motion for
5 sanctions and a hearing; 156 -- or, I think, 132 is also
6 a sanctions motion; and 156 is the government's amended
7 motion for protective order. I've reviewed all of the
8 papers and I would like to talk, first, about the
9 defendant's motions for a hearing and sanctions. And
10 I'll hear from whomever wishes to be heard. And you can
11 stay at counsel table or you can come to the podium,
12 whatever you prefer.

13 MR. BAGLEY: Judge, Jeff Bagley. Judge,
14 I'll go first for Mr. Gogolack. Jeff Bagley for Simon
15 Gogolack. Judge, we are asking, as the Court is aware,
16 just to set the table a little bit, and I know the Court
17 is, I'm sure, prepared for the argument today, but
18 discovery was due on a certain date and it wasn't
19 produced on that date, Judge. And at that status
20 conference, soon thereafter, the Court permitted the
21 parties to file motions that would outline the sanctions
22 that may or may not be appropriate. So, Judge, what
23 we're requesting, as the Court is aware, is a hearing in
24 order to determine what sanctions are appropriate,
25 Judge. I think, at that hearing -- we lay out in our

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2 paperwork the types of things that we believe would
3 be -- would come out at that hearing. And based on
4 that, Judge, we could then be in a better position to
5 seek the appropriate sanctions.

6 So, Judge, I'm happy to answer any questions
7 you have on that, but, essentially, that is, I think,
8 the best course of action. We're not in a position
9 right now to be able to -- to be able to seek specific
10 sanctions. Rule 16 gives the Court pretty wide
11 discretion in terms of the types of sanctions that may
12 be appropriate. And, Judge, I think if you look at the
13 *Morgan* case, there is precedent for, first, having a
14 hearing, and then determining what sanctions are
15 appropriate.

16 MAGISTRATE JUDGE MCCARTHY: Do you think you
17 would find at a hearing some evidence of willfulness or
18 deliberateness?

19 MR. BAGLEY: Judge, I guess that is what we
20 would explore, was it just negligence, was it a mistake,
21 was there good faith involved or not. Those are the
22 types --

23 MAGISTRATE JUDGE MCCARTHY: Well, based on
24 the government's response, I think it's pretty clear
25 that, at a minimum, it was a mistake.

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2 MR. FOTI: Right, Judge. Obviously there
3 was some, there obviously must have been some mistake
4 that occurred because they had 90 days to produce
5 discovery and it wasn't produced in that time. Now
6 whether or not there was more than that, there is no way
7 for us to know that without a hearing.

8 MAGISTRATE JUDGE MCCARTHY: Anybody else
9 wish to be heard?

10 MR. FOTI: Sorry, Judge. There are only so
11 many mikes.

12 MAGISTRATE JUDGE MCCARTHY: That's fine.

13 MR. FOTI: Judge, I agree with the comments
14 that were just made. Probably the most appropriate way
15 of resolving this and finding its way to a disposition
16 is to hold a hearing. I think the government has at
17 least provided us enough information that it's easy to
18 identify how we could proceed with a hearing and how the
19 parameters of the hearing could be controlled in a way
20 that it's not going to require extensive judicial
21 resources to do so. They identified in the prior
22 appearances, starting in February, I think one of the
23 prosecutors referred to an FBI agent that almost
24 exclusively is responsible for putting together the
25 discovery in this case. That identifies an agent who

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2 specifically could explain what was done, how it was
3 done, why they were not able to meet this deadline. I
4 know the government, in their response to the motion for
5 sanctions, there was a lot more candor provided than
6 some of the prior kinds related to realities of being on
7 trial and not ultimately being able to divide the time
8 up among the prosecutors, but I don't know that that
9 explanation is sufficient for purposes of not meeting
10 the requirements of this Court's order. And I think
11 that is identified by the fact that there were other
12 prosecutors on the case and the explanation they really
13 don't know the case as well as us, so they had to wait
14 until we were off trial isn't really a realistic
15 solution to how you deal with discovery where you have
16 multiple defendants in custody. I think what we need to
17 see is what the FBI agent has to say. And the one thing
18 I'll say in terms of whether we'll find that it is
19 willful or not, I don't know that it will be determined
20 that this is more than negligence in that there will be
21 indicia of willfulness, but what I think the Court
22 should review and would be part of the hearing is that
23 there is evidence of when material was compiled and when
24 it was turned over to the trial team. Some of that is
25 documented in an index file that was provided to the

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2 defense as part of the discovery and there are dates
3 contained in one of the columns of that file. And the
4 dates of when some of this discovery was turned over
5 seems to match up with the conclusion of the Bongiovanni
6 trial. I think that is pretty significant if the
7 process of discovery disclosure was essentially on hold
8 until that trial was over.

9 MAGISTRATE JUDGE MCCARTHY: And what date
10 did the Bongiovanni trial end?

11 MR. COOPER: Mid to late April, Judge. I
12 don't know the date off the top of my head. It would
13 have been the second or third week in April.

14 MAGISTRATE JUDGE MCCARTHY: Okay.

15 MR. FOTI: There is at least some indicia
16 from the index that there were efforts to compile the
17 material, but it wasn't turned over for purposes of
18 actually advancing it to defense counsel until around
19 the conclusion of that trial, which was pretty far
20 beyond when the deadline had initially been set back in
21 February. I think a hearing is appropriate or the
22 government can call who they want to provide testimony
23 to explain what occurred. But I think they made it
24 pretty clear, we probably can do this with one specific
25 witness because there is an FBI agent who had this job

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2 that was identified back in February, there was somebody
3 exclusively responsible for this, and he or she has been
4 referenced in submissions since then. I don't think
5 it's a lot to say, let's just clear up what exactly
6 happened here so the sanction is based on, sort of,
7 facts as opposed to conclusory comments that are
8 peppered throughout the submissions at this point.

9 MAGISTRATE JUDGE MCCARTHY: Okay. Anybody
10 else wish to be heard on the defense side?

11 MR. COOPER: Judge --

12 MAGISTRATE JUDGE MCCARTHY: Did you switch
13 teams now? I thought you --

14 MR. COOPER: No, Judge.

15 MAGISTRATE JUDGE MCCARTHY: Right now I'm
16 asking on the defense side and then I'll hear from you
17 or anyone else that wishes to be heard, Mr. Cooper, or
18 whoever wishes to be heard.

19 I know you said you don't think a hearing is
20 necessary, and why is that.

21 MR. TRIPI: If I might just start and then
22 I'll turn it over to Mr. Cooper. I think, obviously, I
23 prepared the filing responding to the motion for
24 sanctions. You have that in front of you. But I would
25 like to just step it back for a second to the

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2 30,000-foot view of things, and I would like to explain
3 it as dispassionately and factually as possible here.
4 All of this litigation that you're about to hear
5 argument about stems from our seeking of a protective
6 order. We've acknowledged in our filing that we
7 probably should have gotten that process started sooner.
8 Okay? I'll fall on the sword for that. All right. But
9 whether there is a basis for a hearing is a totally
10 other question. And I think you should answer that in
11 the negative. I think I've clearly laid out what we
12 were doing and when we were doing it. But stepping back
13 again to that 30,000-foot view, all of this stems from
14 the question of whether or not a protective order, and
15 the protective order in the form that we've sought, is
16 appropriate.

17 Judge, I've been a prosecutor for 20-plus
18 years, almost 17 of it I've been appearing in front of
19 your Honor. I've handled some very serious RICO murder
20 cases, complex conspiracies that involved witness
21 tampering and all types of issues like that.

22 However, this case stems from the case that
23 stands apart from all of the cases that I've had, either
24 before this Court or others in this courthouse, in terms
25 of 19CR227 and 23CR37. The issues that were inherent in

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2 those cases with efforts to tamper with witnesses, to
3 obstruct justice or otherwise improperly influence
4 government witnesses and potential government witnesses,
5 and all of that culminated in this indictment charging
6 the orchestrated death of a federal witness. Those
7 cases included efforts to thwart witness participation
8 even before Mr. Gerace was charged in 19CR227. They
9 involved him suing two witnesses in state court. The
10 government going and getting an injunction of a state
11 lawsuit, that appeal going up to the Second Circuit, and
12 the Second Circuit using language during oral argument
13 that was critical of Gerace's efforts while affirming
14 the injunction that was issued by Judge Sinatra. And
15 then it flowed, once the case was charged, we learned
16 about Facebook threats to witnesses, witnesses who or a
17 witness in particular who was assaulted, and then we
18 learned about an attorney for Mr. Gerace reaching out
19 through an unwitting attorney trying to essentially
20 convince a witness not to cooperate with the government.
21 A witness who was knowingly represented by other
22 counsel. It then led from there to threats by symbolism
23 of placing rats on driveways and vehicles at the
24 locations of not one but two potential witnesses or
25 their families' houses. It continued with comments in

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2 the news denigrating potential witnesses and even
3 government counsel. And it ended with the death of a
4 witness. And all of this was happening as the trial
5 prosecutors here that you see were gearing up for a
6 trial, engaged in a trial, while we were simultaneously
7 investigating the very serious death of a witness,
8 something that courts -- obstruction of justice efforts,
9 the Courts in the Second Circuit and the Second Circuit
10 itself in *LaFontaine* have said are the biggest threat to
11 the integrity of court proceedings. So having the
12 command of the facts of all of those matters, we
13 thoroughly investigated and in rapid succession charged
14 six of these defendants and we produced discovery
15 material in each of those individual's six cases.

16 Now, admittedly, there were three defendants
17 who got nothing. But several of these defendants all
18 went through lengthy detention hearings akin to closer
19 to mini trials. Several of them happened several times.
20 You had several hearings regarding Gogolack, and you
21 have a good handle on everything that he got. But you
22 also were not privy to all of the disclosures made in
23 all of those other cases. And we appeared here, and we
24 didn't articulate that clearly to your Honor, again,
25 while in the midst of separately and in itself a complex

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2 and highly contested trial involving Gerace's
3 co-defendant that was severed.

4 So that is the background, that is the
5 context, that is what I would say at a hearing. I am an
6 officer of the court; that is what happened, Judge.

7 And I don't disagree with the Court's
8 comment that we could have raised a protective order
9 more quickly. But when the light bulb went on, it was
10 after we got the discovery produced. That was a massive
11 undertaking by a number of people and we assigned people
12 to work on it while we were in trial in terms of FBI
13 agents and support personnel and other attorneys simply
14 couldn't get up to speed. And then those attorneys went
15 out on paternity leave, okay? So we assigned two others
16 on the docket, they both left the office for a period of
17 time. There are rules about when you are allowed to
18 have that type of leave in the federal government. And
19 so that is what we were dealing with. I didn't include
20 that part in my filing, but I'm proffering that to you
21 now. And so it fell back to the trial team. And it
22 didn't make sense to try and get even more attorneys up
23 to speed because by the time we were able to get
24 together and marshall together, and it had been worked
25 on and it was in good shape, and through the course of

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2 all of that litigation, the need to seek out a
3 protective order fell off of our radar. It shouldn't
4 have. It should not have. It did. We're human. But
5 we remedied it as quickly as we could. We got the
6 discovery in their hands, you know. They all have the
7 discovery now. You've ran some speedy trial time.
8 We've asked you to run less, but you've run some speedy
9 trial time and in terms of the foul here, that is
10 appropriate. We would like you to run less time and
11 calculate that time a little differently as we've put in
12 our papers, but we're ready to move forward with this
13 case. And these hearings won't result in anything
14 different than what I've just proffered to your Honor.

15 And so that is my sort of opening statement
16 to you. If Mr. Cooper has something he would like to
17 amplify, I'd like to turn it over to him now.

18 MAGISTRATE JUDGE MCCARTHY: Okay.

19 MR. COOPER: Judge, I do have a couple of
20 things to amplify. I guess, first, the Court asked a
21 question of counsel for Defendant Gogolack. I didn't
22 get a quote written down, but it was something like, do
23 you have any reason to believe this was willful and in
24 bad faith. That was in sum and substance your question.
25 And, of course, there was not a definitive answer as to

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2 whether that exists or not because it doesn't exist and
3 counsel doesn't have it. It wasn't in his papers, it
4 wasn't in Defendant Gerace's papers.

5 In 1998, the Second Circuit issued a
6 decision, and this is in our brief, our docket number
7 142, the case is *United States v. Mathurin*,
8 M-a-t-h-u-r-i-n, it's 148 F. 3rd 68 at 69. And that
9 case held: "A defendant may not rely on bald assertions
10 without specification of the factual basis. The
11 district court is not required to have a hearing."
12 There has been no specification of a factual basis.
13 There has been no allegation that something occurred
14 that supports a bad-faith argument. What they are
15 asking for is a fishing expedition and a side show to
16 turn this case away from what it is, which is an
17 indictment of nine defendants on varying, but incredibly
18 serious, charges. That is what the defense is asking
19 for, a hearing that they can direct everyone's attention
20 to away from the indictment and the charges that stem
21 from it.

22 In reality, as Mr. Tripi said, what happened
23 here is we asked them about a protective order later
24 than we should and it caused them to get the discovery
25 12 days later than your Honor ordered. By June 4th, the

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2 discovery was made available to all defendants. The two
3 defendants that still had not provided a three terabyte
4 hard drive by that date were told in an e-mail on June
5 4th that they could come view it at our office. Of
6 course, neither of them did. But it was made available
7 to everybody on June 4th.

8 So what happened was 12 days after this
9 Court ordered this material to be provided, they all had
10 it. In response, what the government asked for in
11 docket No. 142 was the Court run the 12 days. That is a
12 fair response to what happened. They got it 12 days
13 later than you ordered. You run 12 days of speedy trial
14 time. The efforts to turn this mole hill into a
15 mountain is just that, it's an attempt to deflect from
16 the serious charges and what this case is about and turn
17 it into a side show. There has been no basis for a
18 hearing alleged, nothing sworn to in an affidavit that
19 could support that there is even a reason to believe
20 there was bad faith or anything other than a mistake,
21 which is what the government explained in its filing at
22 docket 142.

23 MAGISTRATE JUDGE MCCARTHY: Okay. Thank
24 you.

25 MR. BAGLEY: Judge, if I can respond briefly

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2 to some of that. Judge, I would submit to the Court
3 that the litigation, up to this point, we've
4 demonstrated to this Court that it's not good enough to
5 simply take the government at its word, that you have to
6 take the government's word to put their feet to the fire
7 a little bit in order to get the full truth. For
8 example, Judge, the Facebook post that was referenced in
9 the protective order litigation. Things are omitted
10 from the Facebook post. Previous posts that are
11 relevant to the Court's consideration were not included
12 by the government. And it's up to the defense, in order
13 to test what has been presented to you and given to you
14 as fact in order to get the full picture. So a hearing,
15 Judge, in this case is another example in which we need
16 to be able to test what the government is saying to you
17 in order to present the full picture.

18 And the second point, Judge, that I would
19 like to make is that the government, to sit here and
20 listen to the government today would suggest that they
21 were working diligently, they were on trial and it was
22 just a misunderstanding that they didn't get to this
23 stuff later on. But, you know, from the litigation in
24 the Gogolack detention hearings that we were asking for
25 particular discovery from the get go, and that we

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2 needed, we wanted discovery with respect to the
3 detention hearing in order to rebut some of the
4 accusations made against Mr. Gogolack in respect to his
5 detention, Judge. And we didn't get that discovery.
6 And not only did we not get it, Judge, but, again, this
7 has all been litigated in front of you, so the Court is
8 aware of it, the government went above and beyond in
9 order not to give it to us. They actually limited what
10 they said at the detention hearing so they didn't have
11 to give us discovery. So I think that is another
12 example, Judge, of where this isn't just a
13 misunderstanding or some, you know, we weren't thinking
14 about what we had to produce at a certain time, they
15 were taking affirmative steps to not produce it. And I
16 think, Judge, maybe that is another example as to why a
17 hearing in this case is going to elucidate some more of
18 those facts.

19 MR. COOPER: Judge, I would like to respond
20 to that specifically and maybe we can turn to Mr. Foti.

21 MAGISTRATE JUDGE MCCARTHY: Okay.

22 MR. COOPER: Mr. Gogolack, through his
23 attorney, was produced voluntary discovery in the month
24 of August 2023, September of 2023, October of 2023 and
25 December 2023. All before this second superseding

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2 indictment was ever even returned. Significant,
3 substantial amounts of discoverable material, which Mr.
4 Bagley would not mention to your Honor when complaining
5 that discovery was withheld from him. He got an entire
6 cell phone extraction, dozens of cell phone
7 communications that were separated from the huge cell
8 phone extraction to show they were relevant to the
9 investigation, over 2000 pages of Bates numbered
10 discovery by December of 2023. So the litigation or the
11 back and forth that occurred later while the government
12 was engaged in a nine-week trial about wanting
13 additional discovery to run a detention hearing, that
14 it's our position shouldn't have been reopened in the
15 first place, wasn't something the government was going
16 to do at that time. Instead, we relied on a limited use
17 of information which required less of us at that time
18 and got the same result, which is the defendant remained
19 in custody. But the idea that Defendant Gogolack, in
20 particular, didn't have discovery and is waiting to see
21 some shred of paper in this case is belied by the
22 record. August, September, October and December of 2023
23 substantial discovery productions were made to him.

24 MR. STACHOWSKI: Judge, may I interrupt for
25 a second? Mr. Byrd has an appointment at Roswell at 3

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2 o'clock and he would like to leave, so I waive his --

3 MAGISTRATE JUDGE MCCARTHY: You can waive
4 his appearance.

5 MR. STACHOWSKI: It's okay, you can go to
6 Roswell. You can go now. Sorry.

7 MAGISTRATE JUDGE MCCARTHY: That's all
8 right.

9 Mr. Foti.

10 MR. FOTI: Judge, just to clarify, I ask for
11 sanctions on behalf of Mr. Gerace. We didn't ask for
12 sanctions against any of these prosecutors individually
13 or against this trial team individually. We asked for
14 sanctions against the U.S. Attorney's Office. And I
15 believe Mr. Tripi's comments suggest that there were
16 other prosecutors who were involved who left and there
17 were not accommodations made by the office to pick up
18 the slack. So maybe the problem here is negligence
19 because everything was put on this trial team when they
20 were not in a position to get us discovery in the
21 extended time frame that was provided. But whatever the
22 reason is, we have most of the defendants in custody, we
23 have no discovery by the 60 days the Court originally
24 suggested, we didn't have it by the 90 days that the
25 government asked for.

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2 And I want to clarify one thing that I said
3 earlier, because I just pulled it up. I just made a
4 reference to the information in the index and we let
5 that indicate when the discovery process seemed to
6 begin. I said it seemed that the dates, if you look at
7 the file path on the index for the majority of files or
8 at least some of the files, it suggested that the
9 efforts to produce discovery didn't really start until
10 the Bongiovanni trial concluded. There was no response
11 from the prosecutors to that particular comment that I
12 made, so I pulled up the index so I could give a better
13 clarification of what it appears the evidence suggests,
14 which is the index appears to have 12993 items. So,
15 obviously, that is a lot. 12195, so that is the vast,
16 vast majority of those files, have a file path
17 indicating FBI discovery received and the date that is
18 associated with it is April 26th when the Bongiovanni
19 trial ended. So almost all of the discovery, the
20 process of preparing this discovery, started at the end
21 of the Bongiovanni trial. That is not acceptable,
22 because we have multiple defendants sitting in custody
23 while this trial team is engaged in trial. They are,
24 perhaps, understandably, not able to deal with this, but
25 nobody picks up the slack. That is a problem,

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2 particularly because in February, we were told there was
3 an FBI agent, an almost exclusively, assigned to this
4 task. So we're asking for something very reasonable.
5 We're saying one witness. I'm not asking for the
6 prosecutors to get on the stand and testify. I'm saying
7 there is a federal agent who was apparently identified
8 by this trial team as being responsible for this. Let's
9 just hear from him. Because everything points to a
10 conclusion that they just sat on this process until
11 after the Bongiovanni trial is over. And if that is not
12 case, it could be established in a hearing. But if it
13 is the case, as everything seems to suggest, then much
14 more extensive sanctions than what has been proposed by
15 the government is appropriate. So I think a hearing is
16 the best way to get to the bottom of it the only way we
17 really can. Otherwise, I think the Court has to err on
18 what's in front of it and far more extensive sanctions
19 than what the government is asking for would be
20 appropriate.

21 MR. COOPER: Judge, I can respond to that
22 right away. I mean this with no disrespect. It's not
23 everything points to April 26th being when the discovery
24 project started. Quite the contrary. If you recognize
25 that the evidence is not sitting at the U.S. Attorney's

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2 Office, evidence is collected by federal agencies like
3 the Federal Bureau of Investigation, Homeland Security
4 investigations. The date that Mr. Foti is referencing
5 is when material that had been getting combined and put
6 together and selected and organized for months by the
7 FBI and HSI was dropped off in a hard drive to the U.S.
8 Attorney's Office to begin the process of Bates
9 numbering. So it's just a wholly illegitimate premise
10 that this began when the Bongiovanni trial ended. It's
11 not true, completely not true.

12 The FBI and HSI worked for months before
13 that to gather the material, organize the material,
14 collect it in one location. And what we were attempting
15 to avoid there was a piecemeal production where things
16 can fall through the cracks or things are delivered
17 multiple times, so we asked them to gather information
18 in one collection and provide it to us so that Nick
19 Carter, the IT specialist at the U.S. Attorney's Office,
20 can get started with the processing and Bates numbering
21 of the information, which, itself, takes a significant
22 period of time and a lot of work. It would have been
23 impossible with this amount of information for the
24 agencies and the U.S. Attorney's Office to start in late
25 April and have gotten it done by June. And that is not

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2 what happened. We started when we had the status
3 conference, if not before then. And when the material
4 was produced in one large clip to the U.S. Attorney's
5 Office, that material was processed, Bates numbered,
6 reviewed by AUSAs, document by document, page by page,
7 and then ultimately provided. The 12 days here, it's
8 not about whether people were working on the discovery
9 production, it's about a slip up on my part about a
10 protective order and then not being ready to turn it
11 over without a protective order. Go ahead.

12 MR. TRIPI: That is the one point I wanted
13 to make. We were in a position to turn it over on May
14 20th. Despite everything that we just talked about, we
15 were in a position to turn it over, which was three days
16 before your deadline, and we realized we didn't have the
17 appropriate protective order in place. And we realized
18 four days before that how large the hard drives would
19 have needed to be, so we made those two overtures. One
20 meaning the hard drives. I know some of the defense
21 lawyers said it took us time to get hard drives. Some
22 got us before May 23rd, some got us that day and some
23 got us after that day. And in that window of time, we
24 tried to remedy the protective order issue and tried to
25 get consent and we were ultimately unsuccessful. But,

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2 the not seeking the protective order doesn't fall
3 anywhere else in the office, it falls on us. It falls
4 on the three people in front of you right here. So you
5 don't need to drag in U.S. Attorneys and criminal chiefs
6 or anybody else. There is no basis for a hearing.
7 We're right here. You can ask us whatever questions you
8 want about that. But I'm telling you that, despite the
9 challenges we talked about, we made a mistake. We
10 didn't begin the protective order process earlier. We
11 were in position, though, to provide it and we worked
12 hard with our partners at the FBI and HSI to get it
13 ready consistent with your order. And the one thing
14 that we needed to just rip it out the door by May 23rd,
15 we realized we hadn't buttoned that up, and, you know,
16 we apologize for that.

17 MAGISTRATE JUDGE MCCARTHY: All right.
18 Anybody else? Okay.

19 MR. BOGULSKI: Judge, briefly. If I may,
20 judge. Frank Bogulski representing Howard Hinkle, who
21 is present, in custody. One of the things that I've
22 been hearing here, Judge, is we haven't been (inaudible)
23 in this litigation. On behalf of Mr. Hinkle, Mr. Henry
24 and I, I'm actually sitting in the back.

25 My father is not a lawyer, but he used to

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2 tell me, in America, you get a hearing for anything,
3 even a parking ticket, which is true. And I'm hearing
4 both sides, not exactly involved in this litigation, and
5 I can actually see both sides' positions, but that makes
6 the argument stronger for a hearing because one side,
7 the government, is saying there is no need for a
8 hearing; the other side, the defense, is saying we want
9 a hearing to explore this matter. I think the prudent
10 thing to do, because the more I listen, the more
11 questions I have, because we haven't been exactly
12 involved, I would like to hear from those witnesses or
13 witness, whether it's IT or the person from the FBI that
14 was involved in this, and find out, you know, what
15 happened. And I have no idea, as I sit here, what they
16 are going to say, but why not have a hearing on it?
17 We've done so much litigation on this at this point, I
18 think that is just my opinion and I join in the
19 application for a hearing.

20 MR. COOPER: Judge, the standard for having
21 a hearing is not why not have a hearing. There has been
22 no articulable fact based on a person with personal
23 knowledge that something occurred that was bad faith or
24 anything other than a mistake. The prosecutors that
25 have personal knowledge of how this whole thing played

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2 out detailed for you in 27 pages on docket 142 what
3 happened. There is nothing to contest that other than
4 baseless speculation from counsel about a date in an
5 index, which I now explained, and, hopefully, everybody
6 understands. But why not have a hearing is not the
7 standard for holding a hearing.

8 MAGISTRATE JUDGE MCCARTHY: Okay. Thank
9 you. Mr. Tripi, Mr. Cooper, Ms. Chalbeck, I've known
10 all of you, Mr. Tripi for many, many years; Mr. Cooper
11 for a few years less; and Ms. Chalbeck, most recently.
12 But in all of my dealings with you and continuing to
13 today, I have no reason to doubt your good faith and I
14 appreciate your candor, both in your submission and in
15 what you've said today, but I'm looking also from the
16 standpoint of the defendants, many of whom have been
17 sitting in custody for a considerable period of time. I
18 don't find anything particularly blameworthy in the
19 three of you, what you've done and what you haven't
20 done. I think it's understandable. But I think the
21 responsibility falls on your office to adequately staff
22 every case that they are involved in because the
23 government makes the decision as to when to lodge
24 charges against defendants. I don't find, based on what
25 I've heard thus far, I don't find that there is any

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2 indication of bad faith that would warrant a hearing.
3 However, I do conclude, for many reasons, that the
4 government's conduct has been unjustifiable and it
5 warrants revisiting the Speedy Trial Act exclusion which
6 I imposed on February 23rd.

7 I'm going to write on this in some detail so
8 you'll all have the benefit of my thinking. But what I
9 am going to recommend to District Judge Vilardo is that
10 Speedy Trial Act time, that the previous exclusion be
11 rescinded. What that means is that since the time from
12 February 23rd until we reconvened on June 3rd was more
13 than 90 days, I presume the one or more of the
14 defendants will seek dismissal of the indictment. I'd
15 like to approach this in the most efficient way
16 possible. I could, and I initially thought of just
17 writing my decision on the Speedy Trial Act time and
18 then leave it to everybody to take the next step, but it
19 seems to me, I can't imagine that there wouldn't be, if
20 Speedy Trial Act time during that time frame is not
21 excluded, I can't imagine that there wouldn't be a
22 motion to dismiss the indictment. So what I'm going to
23 suggest is when I issue my decision, we can then follow
24 it with a motion for dismissal. You can address whether
25 the dismissal should be with or without prejudice at

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2 this time. My leaning is that the dismissal would be
3 without prejudice, but none of those motions have been
4 made yet, so I just wanted to review for you what my
5 thinking is. And, again, Mr. Tripi, you made the
6 written submission, you've made a very candid oral
7 presentation, as have you, Mr. Cooper, and I appreciate
8 that. But it's undisputed that the failure to earlier
9 seek a protective order was a mistake that shouldn't
10 have happened.

11 And if I'm looking at the briefing on the
12 protective order, it appears to me that we're not at
13 all, the parties are not at all close to resolving that
14 anyway. But that, to me, is a non-issue unless and
15 until we decide whether the indictment of the second
16 superseding or the superseding indictment is going to
17 survive. And my current thinking is that it will not,
18 but that, I guess, is a question for another day. So I
19 will get a decision out on the Speedy Trial Act
20 exclusion as quickly as possible. That is a sanction
21 and I think it's fully warranted and we'll see what the
22 next step will be.

23 Anybody have any comment or suggestion? All
24 right. Then you can act once my decision comes out.

25 MR. COOPER: Thank you.

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2 MR. TRIPI: Judge, for whatever's it's
3 worth, and I heard everything you just said, the motions
4 are still pending and so time would exclude.

5 MAGISTRATE JUDGE MCCARTHY: If there is
6 anything to exclude.

7 MR. TRIPI: If there is anything to exclude,
8 I just wanted to make that record.

9 MR. HENRY: Your Honor, on that issue, I did
10 talk --

11 MAGISTRATE JUDGE MCCARTHY: I would hold off
12 on that until we see.

13 MR. FOTI: Judge, real quick, I contacted
14 Chambers earlier today along with U.S. Marshals. I
15 think, for the record, it's important that Mr. Gerace
16 waived his appearance due to illness due to the last two
17 days. With everything going on, it's easy to forget
18 about some of the housekeeping matters, but before we
19 break, I wanted to say we make that waiver.

20 MR. BAGLEY: Judge, I'm sorry, I have to
21 pile on as well. I understand where the Court is going,
22 I guess, part of, we're concerned, slightly, that in
23 order to make the motion, Judge, we may have to engage
24 experts in discovery, whatever it is, to fully make that
25 motion, Judge. And the protective order, right now, as

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2 it stands, is "attorneys' eyes only." So I read that, I
3 guess, out of an abundance of caution, to not be able to
4 share any discovery with members, folks we may hire,
5 experts, things of that nature, Judge.

6 MAGISTRATE JUDGE MCCARTHY: Let's take one
7 step at a time. First thing that is coming out, and I
8 hope, I have a trial tomorrow, but I hope much sooner
9 rather than later is my decision to exclude Speedy Act
10 time. I presume that will be followed by motions to
11 dismiss the indictment, either with or without
12 prejudice. We can cross that bridge when we get to it.
13 But it seems to me it makes more sense for everything to
14 go up to Judge Vilardo as a single package, including
15 the exclusion of Speedy Trial Act time and whatever
16 flows from that dismissal of the indictment rather than,
17 I could just say, okay, here is my decision on Speedy
18 Trial Act time, take that up to Judge Vilardo and he
19 decides what he is going to do. If he adopts it, then
20 there is a motion to dismiss the indictment. It just
21 seems to me that is not a particularly efficient way to
22 proceed.

23 MR. BAGLEY: I understand, Judge. And we'll
24 wait for your decision. Maybe my concern will be
25 addressed in your decision. We'll cross that bridge

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when we come to it.

MAGISTRATE JUDGE MCCARTHY: Don't get your hopes up. We'll take one step at a time.

Defendants are remanded.

MR. BAGLEY: Thank you, Judge.

* * *

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript of the record to the best of my ability of proceedings transcribed from the audio in the above-entitled matter.

S/ Karen J. Clark, RPR

Official Court Reporter